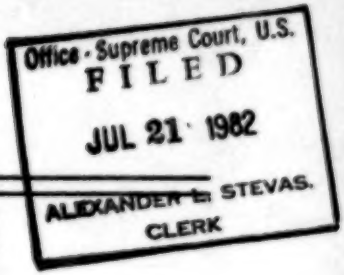
82-164

NO.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

VICTOR J. FELICE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

R. Jack Stephenson
Attorney of Record
Nicholas P. Scarpelli, Jr.
CARNEY, STEPHENSON, BADLEY,
SMITH & MUELLER, P.S.
17th Floor Park Place Bldg.
Seattle, Washington 98101
(206) 622-8020

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a genuine question of material fact existed making it improper for the Court of Claims to grant a motion for summary judgment.

2. Whether the Court of Claims has the power to reinstate Petitioner and to award damages resulting from a failure to appoint him to a full-time magistrate's position where he can show an entitlement, waiver of soveriegn immunity, and no alternative remedies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI ...	13
I. WHEN THE COURT OF CLAIMS GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, IT IMPROPERLY MADE A FINDING OF FACT	13
A. Whether Petitioner's Letter of May 9 Was a Resignation Is a Genuine Issue of Material Fact	14
B. Even if the Letter Can Be Considered a Resignation, the Resignation Was Involuntary and Therefore Ineffective. Voluntariness Is a Factual Question	15

Page

II. BECAUSE PETITIONER CAN SHOW AN ENTITLEMENT TO THE FULL-TIME MAGISTRATE'S POSITION WRONGFULLY WITHHELD, CONSENT BY CONGRESS TO BE SUED, AND LACK OF ANY ALTERNATIVE REMEDIES, THE COURT OF CLAIMS HAS THE POWER TO REINSTATE HIM AND AWARD HIM BACK PAY AND BENEFITS 18

A. Petitioner's Entitlement to the Position Is Based on a Contract Implied in Fact and on Federal Statutes and Regulations 19

B. Failure to Appoint Petitioner to the Full-Time Position Was a Denial of Due Process, a Wrongful Personnel Action Entitling Him to Back Pay and Reinstatement 26

C. The Court of Claims Is Authorized to Award Claims Based on Contract and Federal Statutes and Regulations 30

CONCLUSION 35

APPENDICES

Appendix A - Order of the United States Court of Claims entered on April 23, 1982, granting motion for summary judgment

Appendix B - Petition of Victor J. Felice to the United States Court of Claims

Appendix C - Constitution of the United States, Amendment V

Appendix D - Back Pay Act, 5 U.S.C. § 5596

Appendix E - Federal Magistrates Act as amended by the Federal Magistrates Act of 1979, 28 U.S.C. §§ 631, 633, 634

Appendix F - Tucker Act, 28 U.S.C. § 1491

Appendix G - Federal Rules of Civil Procedure, Rule 56(c)

Appendix H - Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1978)

Reports of the Proceedings of the Judicial Conference of the United Stated Held at Washington, D.C., March 9-10, 1978, and September 21-22, 1978; Selection of Magistrates

Appendix I - Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment of United States Magistrates (March, 1980)

Appendix J - Affidavit of Victor J. Felice

Appendix K - Letter to Judge Marshall Neill from Victor J. Felice dated May 9, 1979

Appendix L - Affidavit of Nicholas P. Scarpelli, Jr.

TABLE OF AUTHORITIES

	Page
CASES	
Alabama v. United States, 282 U.S. 502 (1931)	33
Baltimore and Ohio Ry. v. United States, 261 U.S. 592 (1923)	21
Board of Regents v. Roth, 408 U.S. 564 (1972)	27, 34
DiLuigi v. Kafkalas, 437 F.Supp. 863 (M.D. Penn. 1977), vacated on other grounds, 584 F.2d 22 (3d Cir. 1978), cert denied, 440 U.S. 959 (1979)	29
Goss v. Lopez, 419 U.S. 565 (1975)	28
Gratehouse v. United States, 512 F.2d 1104 (Ct. Cl. 1975) .	16
Lynch v. United States, 292 U.S. 571 (1934)	26
Martin v. Campanaro, 156 F.2d 127 (2nd Cir.1946), cert. denied, 329 U.S. 759 (1946)	19
National Bank of North America v. United States, 456 F.2d 754 (Ct. Cl. 1972) ...	33

Perry v. Sindermann,
408 U.S. 593 (1972) 21, 27, 34

Roskos v. United States,
549 F.2d 1386 (Ct. Cl. 1977) .. 16

United States v. Diebold,
369 U.S. 654 (1962) 14

United States v. Testan,
424 U.S. 392 (1976) 31, 32, 33

United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260 (1954) 24

Vitek v. Jones,
445 U.S. 480 (1980) 26, 34

CONSTITUTION

U.S. Const., Amendment V..... 26, 29

STATUTES

5 U.S.C. § 5596 ..... 28, 29

28 U.S.C. § 631 ..... 4, 19, 24

28 U.S.C. § 633 6

28 U.S.C. § 1491 ..... 30, 32

Federal Rules of Civil Procedure 56(c) 13

REGULATIONS

Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1978)..... 22, 23

Reports of the Proceedings of the Judicial Coinference of the United States Held at Washington, D.C., March 9-10, 1978 and September 21-22, 1978; Selection of Magistrates .. 23

Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment of United States Magistrates (March, 1980) 25

MISCELLANEOUS

3 A. Corbin, Corbin on Contracts, § 562 21

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

VICTOR J. FELICE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Victor J. Felice petitions for a writ of certiorari to review the judgment and order entered in the United States Court of Claims on April 23, 1982.

OPINION BELOW

The order granting the respondent's motion for summary judgment is set forth in the Appendix at A-1 to A-8.

JURISDICTION

The judgment and order of the Court of Claims were entered on April 23, 1982. The Petition for Certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1?55(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Appendices contain the following:

The Fifth Amendment to the Constitution of the United States at C1.

Back Pay Act, 5 U.S.C. § 5596, at D1-D3.

Federal Magistrates Act, 28 U.S.C. §§ 631, 633, 634, at E1-E9.

Tucker Act, 28 U.S.C. § 1491, at F1-F2.

Federal Rules of Civil Procedure, Rule 56(c), at G1-G2.

The Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1978) at H1-H13.

Reports of the Proceedings of the Judicial Conference of the United States Held at Washington, D.C., March 9-10, 1978 and September 21-22, 1978; Selection of Magistrates at H14-H15.

The Regulations of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1980) at I1-I22.

STATEMENT OF CASE

Petitioner Victor J. Felice was appointed part-time United States Commissioner for the Eastern District of Washington by Judge Samuel Driver in 1956. He was reappointed by Judge Charles Powell to four year terms in 1960, 1964

and 1968. Pursuant to the Federal Magistrates Act, 28 U.S.C. § 631, Judge Powell appointed Petitioner to a four-year term as part-time United States Magistrate beginning March 31, 1969. (Petition, B2)

On several occasions, Petitioner advised Judge Powell that the demands of the office were too time consuming for the compensation provided. Judge Powell urged Petitioner to remain in office, promising him that more equitable compensation would be provided. (Affidavit of Felice, J3) Judge Powell expressed his gratitude for Petitioner's continued service as magistrate despite the increased demands on Petitioner's time at the expense of his private law practice. (Affidavit of Felice, J3-J4; Ex. 2, J19) The position was likely to become a full-time one, and Judge Powell indicated that Petitioner was the obvious choice to fill

it. With these assurances, Petitioner curtailed his law practice and stayed in office. (Affidavit of Felice, J4)

Judge Marshall Neill also recognized that the pay was inadequate for the time required by the office. In a letter to Petitioner dated April 23, 1974, Judge Neill asked Petitioner to bear with the government because the salary and benefits would improve. Neill recognized that Petitioner could not continue in office unless the salary was increased. (Affidavit of Felice, J4-J5; Ex. 3, J20-J21) In a letter dated June 7, 1974, Judge Neill asked Judge Richard Chambers of the Court of Appeals for the Ninth Circuit for an increased salary for Petitioner, mentioning Petitioner's hardship and praising him as an experienced, capable and valuable magistrate. (Affidavit of Felice, J5; Ex. 4, J22-J26)

Petitioner remained in the position relying on Neill's assurances. (Affidavit of Felice, J5-J6) At this time in 1974 it was increasingly apparent to Petitioner that the magistrate's position would become full-time some time in the future. (Affidavit of Felice, J6)

On January 25, 1975, Judge Neill and Judge William Goodwin reappointed Petitioner for a four-year term as part-time magistrate. The same year, Judge Neill requested that Petitioner discontinue his state criminal law practice which amounted to 30 percent of his total private practice. Petitioner agreed, despite the financial burden, because the intent of the Magistrates Act expressed in 28 U.S.C. § 633(a)(3) is to establish a system of full-time magistrates and because the increasing workload of the

magistrate's office, the gradual expansion of its duties, and the satisfaction of the federal judiciary with the system indicated that the part-time position probably would be converted to full-time. (Affidavit of Felice, J6-J7)

Petitioner continued to be led to believe he would be nominated. He advised Judge Neill in 1977 that he wished to be appointed. Judge Neill said nothing to indicate that the Petitioner would not be appointed. In fact, Judge Neill led Petitioner to believe that he would be appointed when the position was authorized. In May of 1977, Judge Neill asked Petitioner to attend a seminar specifically for full-time magistrates, which he did. (Affidavit of Felice, J7-J8; Ex. 5, J-27-J28; Ex. 6, J29; Ex. 7, J30)

The full-time position was finally authorized in 1978. Petitioner visited Neill with the express purpose of discussing the position and told him that he wanted to be nominated. Petitioner was aware that, as the present part-time magistrate, he was to be considered as if he were a full-time magistrate whose term had expired. (Affidavit of Felice, J8-J9) Judge Neill told him that a select committee of the local bar would have to approve his appointment. When Petitioner was reappointed by Judge Neill and Judge Jack Turner to the part-time position in 1979, his appointment was for four years or until a full-time magistrate was appointed. (Petition, B3) Petitioner interpreted this provision as an academic method of converting the part-time position to a full-time one, much like the procedure gone through when his office as

commissioner had been converted into his office as magistrate. (Affidavit of Felice, J12-J13) For several years, Petitioner had remained in office only because he had been led to believe he would be nominated and appointed to the full-time position. (Affidavit of Felice, J10)

But with no warning of any kind, Petitioner received a letter from Judge Neill on May 7, 1979, saying that Neill had appointed Smithmoore P. Myers to the full-time position. Judge Neill never announced the opening, never solicited applications, and never formed a nominating commission or select bar committee. (Petition, B4-B5) Petitioner responded with a letter expressing his shock, anger, disappointment, and frustration and stated that Judge Neill had led him to believe he would be appointed. He

pointed out that Judge Neill had ignored the Judicial Conference guidelines in failing to announce the opening and in nominating an individual unqualified because he would be 70 years old before his term expired. (Letter from Felice to Judge Neill, May 9, 1979, K1-K11)

Petitioner said his reputation had been ruined by a suggestion that he was replaced because of misfeasance or malfeasance. He did, however, remain available to serve as a full-time magistrate if Neill would reconsider. (Letter from Felice to Judge Neill, May 9, 1979, K11) Judge Neill nevertheless appointed Myers to succeed Petitioner. Petitioner's letter of May 9 was the only means he had to appeal from Judge Neill's decision and to mitigate and negate the innuendos and inferences of misconduct, incompetency or

neglect of duty generated by the disclosure of his removal. Petitioner was discarded without cause or a hearing and was left with no administrative remedies. (Affidavit of Nicholas P. Scarpelli, Jr., L1-L3) The letter was also an attempt to convince Judge Neill to change his mind. (Affidavit of Felice, p. J13-J14)

During the spring of 1979 when these events transpired, Judge Neill was severely ill. He had undergone major surgery in April of 1979, and was incapacitated to the point where he was unable to attend his office or court to perform his judicial functions. (Affidavit of Felice, J16-J17)

Further challenging the abolishment of his position, Petitioner filed suit in U.S. District Court for the Eastern District of Washington The suit was voluntarily dismissed on August 25, 1980.

(Petition, B1-B2) Petitioner then filed the present action in the U.S. Court of Claims, pursuant to 28 U.S.C. § 1491, seeking to recover back pay, benefits and damages to his private law practice; restoration to his part-time position or appointment to a full-time position; and placement in the appropriate retirement status. (Petition, B6-B7)

Respondent brought a motion for summary judgment. The Court of Claims granted it, holding that Petitioner had resigned, terminating any entitlement to the part-time position and that the Court of Claims did not have the power to award the full-time position or its emoluments. (Order, A3)

REASONS FOR GRANTING THE WRIT

I. WHEN THE COURT OF CLAIMS GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, IT IMPROPERLY MADE A FINDING OF FACT.

The Court of Claims committed reversible error when it granted Respondent's motion for summary judgment. The Court held that Petitioner had resigned his part-time position in his letter of May 9, 1979, and consequently was not entitled to either reinstatement in the position or its salary and benefits. Whether the letter had the legal effect of a resignation was a question of fact. Petitioner had presented both legal and factual arguments why his letter could not be considered a resignation as a matter of law.

A motion for summary judgment cannot be granted when there is the existence of a genuine issue as to a material fact. Fed. R. Civ. P. 56(c). A court has no

discretion in granting a motion for summary judgment but may determine only whether an issue of fact exists. The court must not resolve an actual issue. United States v. Diebold, 369 U.S. 654 (1962). Where genuine issues of fact do appear, inferences drawn from the underlying facts presented by the non-moving party must be reviewed in the light most favorable to him. Diebold, supra.

Those inferences establish a contract with the Respondent, a shocking and sudden breach, a fervent appeal and promise to continue if called upon.

A. Whether Petitioner's Letter of May 9 Was a Resignation Is a Genuine Issue of Material Fact.

Petitioner argues that the letter to Judge Neill was not a resignation. A fair reading of the letter in its entirely and an analysis of it in view of the

circumstances under which it was written support his argument. The letter plainly shows that Petitioner expressed a desire and willingness to continue as magistrate and that he requested Judge Neill to reconsider his decision. The letter was an act of frustration and regret, a formal complaint, and a plea for reconsideration to which Judge Neill failed to respond.

B. Even if the Letter Can Be Considered a Resignation, the Resignation Was Involuntary and Therefore Ineffective. Voluntariness Is a Factual Question.

In its holding, the Court of Claims did not address the issue raised in the Petitioner's reply to Respondent's motion that the letter, if construed to be a resignation, was elicited under duress. An action is not voluntary when it is brought about by government conduct which

is wrongful. Roskos v. United States, 549 F.2d 1386 (Ct. Cl. 1977). Petitioner feared for his professional reputation, correctly believing that the consensus of the community in which he practiced was that he had been terminated for misfeasance and malfeasance. Fear of adverse professional consequences which may result from a failure to resign, when the fear is the reason for the resignation, negates a question of voluntariness. Gratehouse v. United States, 512 F.2d 1104 (Ct. Cl. 1975). The letter of May 9, 1979, must be viewed as the only way Petitioner had to counter the innuendos and inferences of misconduct that were raised by his removal. Voluntariness is a question of fact and is not appropriately decided on a motion for summary judgment. Gratehouse v. United States, supra.

No matter what interpretation is given the letter, that interpretation is not dispositive of Petitioner's claim. Petitioner is claiming he was wrongfully denied the full-time position or, alternatively, he was wrongfully discharged from his part-time position before his four year term, provided by the Magistrates Act, expired. Petitioner's claim to reinstatement to the part-time position and benefits was dismissed by the Court when it granted the motion for summary judgment. Petitioner is now asking that the Supreme Court remand the case to the Court of Claims with instructions to hear evidence on the issue of the effect of the May 9, 1979, letter, as well as the merits of his claim.

II. BECAUSE PETITIONER CAN SHOW AN ENTITLEMENT TO THE FULL-TIME MAGISTRATE'S POSITION, CONSENT BY CONGRESS TO BE SUED, AND LACK OF ANY ALTERNATIVE REMEDIES, THE COURT OF CLAIMS HAS THE POWER TO REINSTATE HIM AND AWARD BACK PAY AND BENEFITS.

The Court of Claims also granted a motion for summary judgment on the Petitioner's claims of entitlement to the full-time magistrate position and back pay. The Court said that it was without power to award either the position or the back pay because Petitioner showed neither legal entitlement to the office nor consent by Congress to be sued. The Court's conclusion is incorrect. Petitioner has shown that he is entitled to the position and that Congress has waived sovereign immunity because of the entitlement.

A. Petitioner's Entitlement to the Position Is Based on a Contract Implied in Fact and on Federal Statutes and Regulations.

First, the Petitioner has a contract implied in fact. A contract implied in fact is derived from the presumed intention of the parties as indicated by their conduct. Martin v. Campanaro, 156 F.2d 127 (2d Cir. 1946), cert denied 329 U.S. 759 (1946). The acts of the judges of the District Court for the Eastern District of Washington indicate that Petitioner was to be appointed to the full-time position. A magistrate is subject to appointment and dismissal by the judges of the district in which he serves. 28 U.S.C. § 631(a), (i). Judge Neill had the authority to continue Petitioner's duties in the full-time position. When the position was converted to full time and the appointment made, Judge Neill was the only federal district judge in the

Eastern District of Washington. Petitioner justifiably relied to his detriment on Judge Neill's representations. In his twenty-two years of service, Petitioner received many expressions of gratitude and confidence from district court judges. He had been urged to continue in his office with assurances that his salary would increase and with knowledge that the position would eventually be converted to full-time. When he was asked by Judge Neill, and as his duties as magistrate began to demand more of his time, he curtailed his private practice, relying on representations that he would be appointed to the full-time position. Judge Neill told Petitioner that all that was necessary before his appointment to the position was the approval of the local bar association. These understandings and representations of the men who

had the authority to give him the position secured for the Petitioner a contract implied in fact. A contract in fact is implied where there are circumstances which, in the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. Baltimore and Ohio Ry. v. United States, 261 U.S. 592 (1923).

This court recognized an implied contract in fact from rules and understandings in Perry v. Sindermann, 408 U.S. 593 (1972). In its discussion the court cited favorably from 3 A. Corbin, Corbin on Contracts § 562 (1960). That section says, in part,

> When a court finds and enforces such a promise as this, it finds it by interpretation of the promissor's words and conduct in the light of the surrounding circumstances. . . . It is the same whether the contractor expressed his intentions in the form of words, oral or written, or expressed

> them by conduct wholly non-verbal, or used both forms of expression together. . . . Even silence and inaction, when the known circumstances make an inference of assent reasonable, may be interpreted as the making of a promise.

Petitioner's belief that he would be appointed to the full-time position was also based upon the selection procedures adopted by the United States Judicial Conference. The procedures provided:

> When a part-time magistrate position is upgraded to full-time, the incumbent part-time magistrate should be subject to consideration for the full-time position as if he were a full-time magistrate whose term was expiring.

Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates, Nominating Commission, IV(C). These same procedures disqualified Mr. Myers because he would have reached the age of seventy before his term expired, in violation of

the Standards and Procedures, Standards for Selection of Magistrates, I(E), and because he had been appointed without public notice of the opening as required by the Standards and Procedures, Court Action, I(A).

In September, 1978, the Judicial Conference specifically directed the district courts to comply with the regulations adopted in 1978. Reports of the Proceedings of the Judicial Conference of the United States Held at Washington, D.C. March 10, 1978 and September 21-22, 1978; Committee on the Administration of the Magistrate System; Selection of Magistrates. H14-H15. The selection of Mr. Myers and dismissal of Petitioner were not made in accordance with the regulations. An agency of the government must scrupulously observe rules, regulations, or procedures which it has

established. If it fails to follow them, the courts will strike down actions the agency has taken. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). Once the Judicial Conference had directed the district courts to follow the selection procedures in September of 1978, Judge Neill could not select a full-time magistrate without regard to those procedures.

This argument is further supported by the regulations adopted by the Judicial Conference in March of 1980 in response to an amendment to the Federal Magistrates Act (28 U.S.C. § 631(b)(5)). These provisions are nearly identical to those adopted in March of 1978 but a new section, Chapter 8, entitled "Transitional Provisions," provides:

> Selection of nominees made prior to the effective date of these regulations shall be deemed to be made in accordance

> with these regulations, provided, however: (a) that the appointing court has complied with the procedures set forth in the guidelines of the Judicial Conference for the Appointment of United States Magistrates which were established by the conference in March 1977 [sic]; and (b) that the nominee for appointment has been selected pursuant to procedures which have included a public notice of any vacancy and the establishment and utilization of a merit selection panel composed of residents of the district; and (c) the nominee meets all statutory qualification standards and requirements of the Federal Magistrate's Act, as amended.

Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment of United States Magistrates (March, 1980) Chapter 8, Sec. 8.01.

B. Failure to Appoint Petitioner to the Full-Time Position Was Denial of Due Process, a Wrongful Personnel Action Entitling Him to Back Pay and Reinstatement.

The Fifth Amendment mandates that the Petitioner not be deprived of property without due process of law. Petitioner has shown that he has an entitlement to the full-time position arising out of a contract implied in fact based upon understandings, rules, and regulations. Contractual rights with the United States are "property" and are protected by the Fifth Amendment. Lynch v. United States, 292 U.S. 571 (1934). Further, where a statute, regulation, rule or practice prescribes qualifications and methods, a person governed by those statutes, regulations, rules, or practices has a protected interest in seeing that they are followed and applied to the individual. Vitek v. Jones, 445

U.S. 480 (1980) (statute and official practice); Perry v. Sindermann, 408 U.S. 593 (1972) (rules and understandings); Board of Regents v. Roth, 408 U.S. 564 (1972) (terms of appointment). In Sindermann, the court recognized a constitutionally protected property right in employment based on words and conduct of a public employer.

If Petitioner has a protected property interest, he has a right to the due process that was denied him. Petitioner was summarily dismissed from office. His only administrative remedy was an appeal to Judge Neill to reconsider. Such an appeal is not an adequate remedy. Judge Neill had dismissed Petitioner and failed to honor his agreement to appoint Petitioner to the full-time position. At the very least, due process requires that notice and opportunity for a hearing

appropriate to the situation must precede any deprivation of property. Goss v. Lopez, 419 U.S. 565 (1975). Petitioner received no notice, hearing, or reasons for his dismissal.

Judge Neill's failure to appoint Petitioner to a position to which he was entitled was an unjustified and unwarranted personnel action. Petitioner could be deprived of his entitlement only if he were afforded due process. The Back Pay Act authorizes government employees who are deprived of salary and benefits because of unjustified personnel action to receive their back pay when they can show a violation of an applicable law, rule, regulation, or collective bargaining agreement. 5 U.S.C. § 5596. Petitioner was denied due process and has no administrative remedies. Because Petitioner can point to the Constitution,

statutes, and regulations as the source of his entitlement to the full-time position, Congress has explicitly waived sovereign immunity in the Back Pay Act.

In DiLuigi v. Kafkalas, 437 F.Supp. 863 (M.D.Pa. 1977), vacated on other grounds, 584 F.2d 22 (3rd Cir. 1978), cert. denied, 440 U.S. 959 (1979), the court held that the Back Pay Act expressly authorized the award of back pay to a government emplcyee who had been wrongfully terminated in violation of the due process clause of the Fifth Amendment. The court said that reinstatement and back pay were appropriate remedies because any lesser remedies would depreciate the seriousness of the violation of due process. Petitioner here is seeking the same relief for the same reason - the violation of his Fifth Amendment rights.

Back pay and reinstatement are the appropriate award.

C. The Court of Claims Is Authorized to Award Claims Based on Contract and Federal Statutes and Regulations.

The Tucker Act, 28 U.S.C. § 1491, gives the Court of Claims jurisdiction to render judgment on claims against the United States based on the Constitution, an act of Congress, a regulation of an executive department, or upon any express or implied in fact contract with the United States. The Act also allows the Court, as an incident to any monetary judgment, to restore a claimant to office.

The Court of Claims refused to hear Petitioner's claim to the full-time position, holding that it did not have the power to reinstate Petitioner or award him back pay and benefits. The Court

concluded that Petitioner had no grounds on which to sue the United States because he could show no legal entitlement and that he had no legal entitlement because he had not been appointed. The Court seemed to agree that Petitioner had a property right, but that alone was insufficient.

The Court based its decisions on United States v. Testan, 424 U.S. 392 (1976), but its reliance was not justified. The respondents in Testan were two attorneys who were dissatisfied with their job classification and sued for reclassification and back pay under the Classification Act, 5 U.S.C. § 5101, and the Back Pay Act, 5 U.S.C. § 5596. The respondents did not allege a breach of contract. The Supreme Court ruled against them, saying that neither the Classification Act nor the Back Pay Act

entitled the respondents to money damages. The rule of Testan is that one is not entitled to the benefit of a position until he has been duly appointed to it. Testan, supra, at 955. The Court said that the Back Pay Act did not apply to a wrongful classification action and that therefore there was no waiver of sovereign immunity. Finally, the respondents had administrative remedies.

Petitioner has shown why he has an entitlement under federal statutes and regulations and where Congress has agreed to be sued under the Back Pay Act because of that entitlement. Therefore, the Court of Claims has jurisdiction under the Tucker Act. But in addition, Petitioner's claim is based upon a breach of contract, a separate and distinct basis for jurisdiction under the Tucker Act, 28 U.S.C. § 1491. Petitioner must be

allowed to bring his action in the Court of Claims because that is the only forum available to him. Unlike respondents in Testan, Petitioner has no other remedies. The Court of Claims can award back pay and reinstate him to the full-time position. If he can not bring his action there, then he has a right with no remedy. The Court of Claims need not be worried about being inundated with a flood of claims. This situation involving a U.S. Magistrate is surely unique on its facts. The rule in Testan need not be reversed or even modified. Petitioner's claim falls outside the rule.

On the other hand, the Court of Claims, and no other court, has jurisdiction over contract claims with the United States where damages exceed $10,000. Alabama v. United States, 282 U.S. 502 (1931); National Bank of North

America v. United States, 456 F.2d 754 (Ct. Cl. 1972). Congress has never intended that the United States be able to contract with a citizen, breach the contract, and disregard a claim for damages with the defense of sovereign immunity. The Court of Claims has ignored this Court's decisions in Vitek v. Jones, 445 U.S. 480 (1980), Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). It refuses to recognize the Petitioner has a right to be heard on the merits of his contract claim.

Unless this Court grants the writ of certiorari, Petitioner will be denied all access to a remedy. The Court of Claims erred in granting a summary judgment when it decided a question of fact and when it misinterpreted its power to grant relief to Petitioner.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

R. JACK STEPHENSON
Attorney of Record

NICHOLAS P. SCARPELLI, JR.

CARNEY, STEPHENSON, BADLEY,
SMITH & MUELLER
17th Floor Park Place Bldg.
Seattle, Washington 98101
206/622-8020

Attorneys for Petitioner